IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEMBERG LAW, LLC, *et al.* Appellants, v. RICHARD ARROWSMITH, AS LIQUIDATING TRUSTEE OF THE HDL LIQUIDATING TRUST Appellee.	)	Civil Action No. 16-CV-763-JAG

MOTION TO STAY PRELIMINARY INJUNCTION

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Lemberg Law, LLC, ("Lemberg Law") on behalf of itself and its clients (the "Consumers", collectively with Lemberg Law, "Appellants"),[1] in light of this Court's recent Order granting leave to appeal the preliminary injunction (the "Injunction Order") issued by the United States Bankruptcy Court for the Eastern District of Virginia (the "Bankruptcy Court"), hereby moves this Court for a stay of the Injunction Order. The Injunction Order was entered in an adversary proceeding (the "Adversary Proceeding") initiated by Richard Arrowsmith, in his capacity as Liquidating Trustee of the HDL Liquidating Trust (the "Liquidating Trustee") of Health Diagnostic Laboratory, Inc. ("HDL" or "Debtors"), in which Appellants are Defendants.

UNDER BANKRUPTCY RULE 8007(B), THIS MOTION SHOULD BE HEARD BY THE DISTRICT COURT

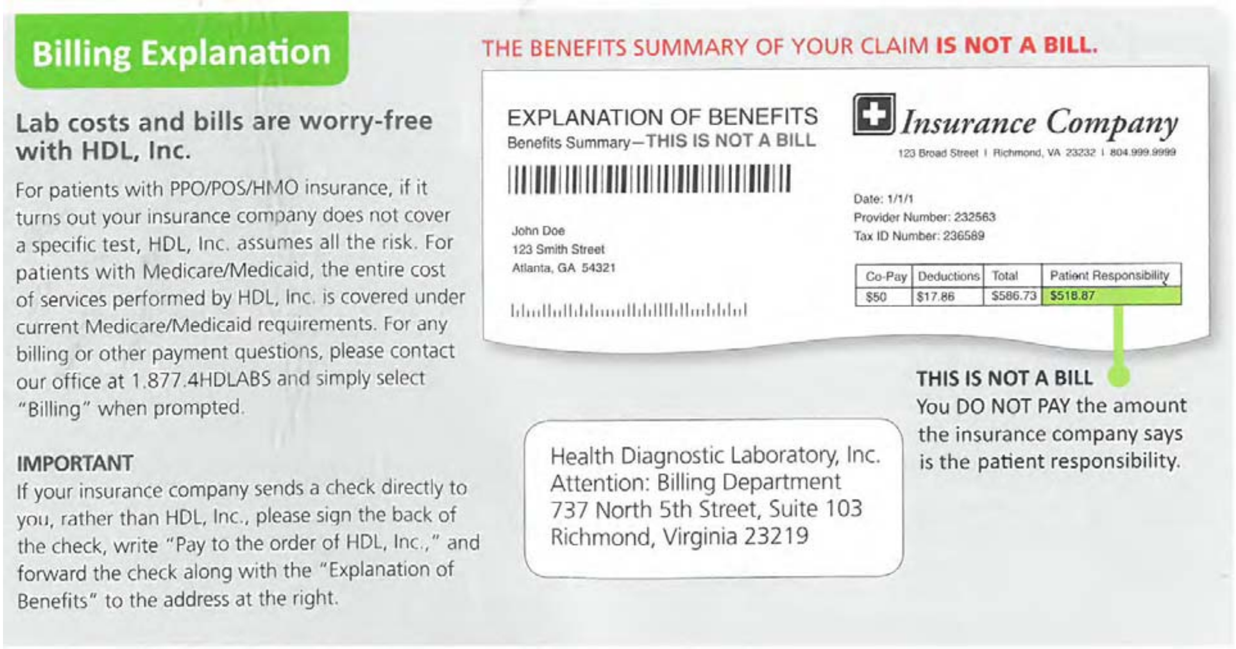
Ordinarily, a party would first file in the bankruptcy court for a stay pending appeal pursuant to Bankruptcy Rule 8007(a). However, under the present circumstances and given the posture of current filings in the Adversary Proceeding, moving first in the Bankruptcy Court would be impracticable. The appeal is already before this Court, and it is a non-core matter over which this Court has original jurisdiction and may conduct *de novo* review of all findings. *Executive Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165, 2170 (2014). On September, 21, 2016, Appellants filed their Motion to Dismiss the Complaint by Appellants ("Motion to Dismiss") in the Adversary Proceeding. At the hearing conducted October 20, 2016, on Appellants' Motion to Dismiss, the Bankruptcy Court indicated its belief that it had no jurisdiction over the case while this appeal is pending.[2] Since the Bankruptcy Court believes it

[1] The Consumer/clients joining this are Arendt, Eileen; Cancel, Linda; Reed, Emily; Volesky, Leah; Porter, Cynthia; Wixom, Jolene; Schurger, Dani; Tebo, Lara; Roecks, Tara; Porter, Kelly; Barbano, Terri; Svendsen, Calico; Caldwell, Nicolette; Chance, Lorinne; Merriott, Toni; Papich, Tiffanie; Lagrou, Christina; Marks, Barbara K.; Dixon, Kimberly; Bray, Korynne; and Delfino, Joseph.

[2] Transcript has been ordered and will be filed as soon as it becomes available.

lacks jurisdiction to adjudicate the Motion to Dismiss, it stands to reason that it would be most practicable and expedient to have the present motion decided by the District Court.

Finally, this Court is well suited to resolve the controlling legal questions in this case. In the underlying adversary proceeding, using entirely novel legal theories, the Liquidating Trustee is attempting to hold the Consumers – and thousands other prior patients of HDL – liable for blood tests they were never billed for, never agreed to pay, and were explicitly told were free of charge if insurance denied coverage. The billing explanation for HDL tests specifically provided:


Billing Explanation
Lab costs and bills are worry-free with HDL, Inc.
For patients with PPO/POS/HMO insurance, if it turns out your insurance company does not cover a specific test, HDL, Inc. assumes all the risk. For patients with Medicare/Medicaid, the entire cost of services performed by HDL, Inc. is covered under current Medicare/Medicaid requirements. For any billing or other payment questions, please contact our office at 1.877.4HDLABS and simply select "Billing" when prompted.
IMPORTANT
If your insurance company sends a check directly to you, rather than HDL, Inc., please sign the back of the check, write "Pay to the order of HDL, Inc.," and forward the check along with the "Explanation of Benefits" to the address at the right.
THE BENEFITS SUMMARY OF YOUR CLAIM IS NOT A BILL.
EXPLANATION OF BENEFITS
Benefits Summary—THIS IS NOT A BILL
Insurance Company
123 Broad Street | Richmond, VA 23232 | 804.999.9999
John Doe
123 Smith Street
Atlanta, GA 54321
Date: 1/1/1
Provider Number: 232563
Tax ID Number: 236589
Co-Pay $50
Deductions $17.86
Total $586.73
Patient Responsibility $518.87
THIS IS NOT A BILL
You DO NOT PAY the amount the insurance company says is the patient responsibility.
Health Diagnostic Laboratory, Inc.
Attention: Billing Department
737 North 5th Street, Suite 103
Richmond, Virginia 23219

(Porter Aff.[3] Ex. A). All Consumers live in Washington State, and are now forced to defend this proceeding in Virginia.

The Verified Complaint against Appellants on the basis of which the injunction was obtained is a vague conclusory document. It does not allege actual facts in support of its claims for relief, relying instead on "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" prohibited by the Supreme Court. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577, 127 S. Ct. 1955 (2007). Indeed, despite running some 145 paragraphs, the Verified Complaint does not allege actual facts against Lemberg Law or the Consumers (***there is not one fact alleged as to any specific Consumer – not one – beyond their name***) sufficient to even remotely state a claim for relief.[4]

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[3] "Porter Aff." refers to the Affidavit of Kelly Porter."

With its complaint, the Liquidating Trustee sought and obtained an injunction prohibiting Appellants from taking vague and unspecified conduct which might "interfere" with the trustee's efforts to collect. In granting the injunction, the Bankruptcy Court did not make any findings of fact or rulings as to controlling law. The vagueness of the Injunction Order itself creates uncertainty and confusion, conflicting with the federal rules of procedure and Fourth Circuit precedent. Fed R. Civ. P. 65(d); *CPC Intern., Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000) (Rule 65(d) of the Federal Rules of Civil Procedure provides "Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail . . . the acts sought to be restrained"); *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713 (1974) (the provisions of Rule 65(d) are not mere technical requirements, but were designed to "prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood").

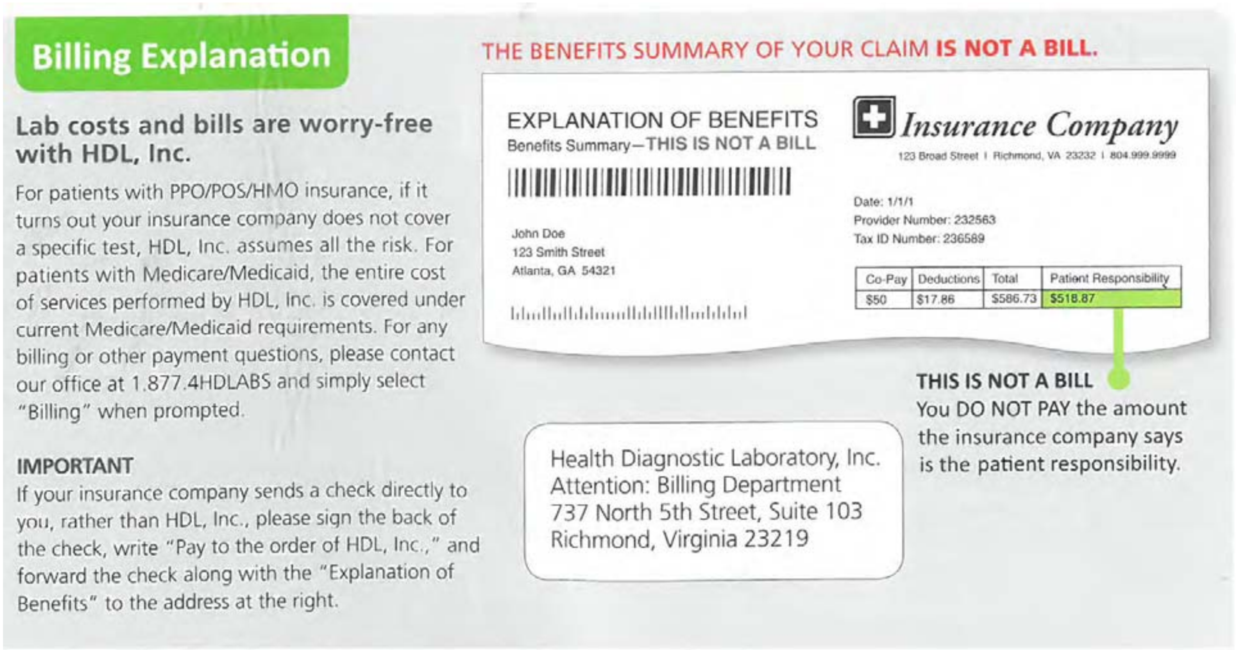
A stay is required in this matter pending appeal of the Injunction Order. Because the Injunction Order fails to provide notice as to what conduct it seeks to enjoin, and fails to fulfill the mandatory requirements of the Federal Rules and the Fourth Circuit, Appellants are likely to win on the merits of their appeal. Moreover, public policy favors compliance with the Federal

[4] Appellants filed their Motion to Dismiss the Verified Complaint on September 21, 2016 in the Adversary Proceeding.

Rules where the public faces a risk of suffering irreparable harm from violating a vague Court Order. Therefore, for the reasons contained herein, Appellants respectfully request that this Court issue a stay of the factually and legally insufficient Injunction Order.

BACKGROUND

HDL was in the business of performing blood tests, for which it did not charge Consumers. Instead, HDL agreed to charge the Consumers' insurance carriers and, if the insurance carriers did not pay, HDL bore the risk of non-payment. HDL boasted that "Lab costs and bills are worry-free with HDL, Inc.":


Billing Explanation
Lab costs and bills are worry-free with HDL, Inc.
For patients with PPO/POS/HMO insurance, if it turns out your insurance company does not cover a specific test, HDL, Inc. assumes all the risk. For patients with Medicare/Medicaid, the entire cost of services performed by HDL, Inc. is covered under current Medicare/Medicaid requirements. For any billing or other payment questions, please contact our office at 1.877.4HDLABS and simply select "Billing" when prompted.
IMPORTANT
If your insurance company sends a check directly to you, rather than HDL, Inc., please sign the back of the check, write "Pay to the order of HDL, Inc.," and forward the check along with the "Explanation of Benefits" to the address at the right.
THE BENEFITS SUMMARY OF YOUR CLAIM IS NOT A BILL.
EXPLANATION OF BENEFITS
Benefits Summary—THIS IS NOT A BILL
Insurance Company
123 Broad Street | Richmond, VA 23232 | 804.999.9999
John Doe
123 Smith Street
Atlanta, GA 54321
Date: 1/1/1
Provider Number: 232563
Tax ID Number: 236589
Co-Pay | Deductions | Total | Patient Responsibility
$50 | $17.86 | $586.73 | $518.87
THIS IS NOT A BILL
You DO NOT PAY the amount the insurance company says is the patient responsibility.
Health Diagnostic Laboratory, Inc.
Attention: Billing Department
737 North 5th Street, Suite 103
Richmond, Virginia 23219

(Porter Aff. Ex. A).

In other words, a patient was liable for payment only if the insurance company sent reimbursement to a patient rather than HDL. When employees in the accounting department asked why patients were not being billed they were told by the Chief Financial Officer that "the policy was to make more money by not billing the patients."[5]

On June 7, 2015 (the "Petition Date"), HDL filed voluntary petitions in the United States Bankruptcy Court for the Eastern District of Virginia Richmond Division, seeking relief under chapter 11 of the Bankruptcy Code, thereby commencing jointly administered Chapter 11 cases. (Exhibit A). Thereafter, on September 17, 2015 the Bankruptcy Court approved the sale of HDL's assets (the "HDL Sale"), in which it retained ownership of accounts receivable aged 180 days or more as of the Closing Date (the "Excluded Receivables"). (Exhibit B).

On or about July 28, 2015, the Liquidating Trustee enlisted the services of Accelerated Receivables Management, Inc. ("ARM"), Monterey Financial Services ("Monterey"), and Remex, Inc. ("Remex") (hereinafter the "Debt Collectors"), to pursue collection of the Excluded Receivables owned by HDL. (Exhibit C at ¶ 35). Significantly, the Liquidating Trustee admits that the "books and records [of HDL] were a complete mess," yet it handed off that "mess" to the Debt Collectors for indiscriminate collection. (Exhibit D at 7:16-18).

The Consumers received demand letters from the Debt Collectors, demanding payment for thousands of dollars which were billed to and denied by insurance coverage. For example, Consumer Christine Lagrou was sent a collection letter by Monterey on April 29, 2016, demanding $2,709.35. (Lagrou Aff.[6] Exhibit A). The bill had been denied by Ms. Lagrou's insurance carrier in 2014. (Lagrou Aff. ¶¶ 15-16). Ms. Lagrou disputed the debt as (1) was her right under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692g, and (2) as asked by Monterey's collection letter. (Lagrou Aff. ¶¶ 11-12). Shockingly, in response Monterey informed Ms. Lagrou that her debt, which was not owed in any respect, was a

[5] http://www.forbes.com/sites/larryhusten/2015/04/21/inside-the-scandal-profit-and-greed-at-an-embattled-laboratory-company/#7ec4c9c157fa.
[6] "Lagrou Aff." refers to the Affidavit of Christina Lagrou.

"defaulted account" and threatened to report the account as a "disputed collection account on your credit report." (Lagrou Aff. ¶¶ 13-14).

Many patients and medical offices throughout the country have been complaining of the actions of the third party Debt Collectors and the Liquidating Trustee, who are demanding patients who owe nothing pay thousands of dollars. Consumers are patients of Northwest Health Summit, PS d/b/a Women's Health Connection, PS ("Women's Health") in Spokane, Washington. They are several of many patients who have received demanding letters from the Debt Collectors, for debts they did not incur. Some complained to the offices of Attorneys General in their States, as is their right under the First Amendment to the U.S. Constitution.

Many have disputed these debts as of right under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g. It is a quintessential violation of the FDCPA for a debt collector to falsely represent the character, amount, or legal status of any debt. *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 395 (4th Cir. 2014) (letter violated FDCPA by stating that the debt remained legally due and owing when it had been paid); *Gathuru v. Credit Control Servs., Inc.*, 623 F. Supp. 2d 113, 121-22 (D. Mass. 2009) ("Simply stated, it was literally false that Gathuru owed $2,000.44 at the time he received CCS's notice."); *see also Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006) (misrepresenting amount of debt is a violation of the Act even when not done intentionally); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1119 (9th Cir. 2014). By any measure, telling these Consumers that they owed crushing liability for tests which HDL told them they did not have to pay created a false and material misrepresentation regarding both the amount and the status of a debt. *McLaughlin v. Phelan Hallinan & Schmieg*, LLP, 756 F.3d 240 (3d Cir. 2014) (misrepresentation regarding amount due as of particular date); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 175 (3d Cir. 2015), *cert.*

denied sub nom. Udren Law Offices, P.C. v. Kaymark, 136 S. Ct. 794 (2016); *Hepsen v. Resurgent Capital Servs., LP*, 383 F. App'x 877, 883 (11th Cir. 2010) ("District Court's finding of fact that JCC incorrectly stated the debt in its demand letter is supported by sufficient evidence."); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872, 875–76 (7th Cir. 2000) (finding that a dunning letter that stated only the unpaid principal balance, when a known amount of interest had accrued, violated the FDCPA). However, to be sure, none of the Consumers have initiated any lawsuit against Debt Collectors, nor have they taken steps other than disputing the validity of these debts which are not owed.

The Consumers hired Lemberg Law to prosecute violations of the Fair Debt Collections Practices law and similar statutes against the debt collectors. That the Debt Collectors' practice of demanding payment for debts not owed, falsely claiming accounts were in "default" when nothing of the sort was true, and making false and harmful credit reporting threats would prompt a wave of consumer complaints and disputes is entirely predictable. In fact, it is exactly how the FDCPA is designed to function to protect consumers from debt collectors who violate the law.

But the Trustee sued Appellants first. Along with the Complaint, the Liquidating Trustee simultaneously filed a Motion for an Order to Maintain the Status Quo Ante Pending Final Determination of Merits of the Complaint along with its Verified Complaint. (Exhibit E). Appellants filed a Response in Objection to Motion of Plaintiff for an Order to Maintain the Status Quo Ante Pending Final Determination on Merits of Complaint on August 15, 2016. (Exhibit F).

Following an August 18, 2016 hearing, the Bankruptcy Court entered an Order Maintaining the Status Quo Ante Pending Final Determination on Merits of Complaint on August 30, 2016. (Exhibit G). In response to the Bankruptcy Court's Order Maintaining the

Status Quo Ante, Appellants filed their Motion to Take an Appeal as of Right on September 13, 2016. (Exhibit H). On October 7, 2016, the United State District Court for the Eastern District of Virginia, Richmond Division accepted the appeal. (Dkt. 5). Appellants seek a stay of the preliminary injunction issued by the Bankruptcy Court, for the reasons stated below.

ARGUMENT

I. STANDARD FOR GRANTING STAY OF INJUNCTION PENDING APPEAL

Rule 62(c) of the Federal Rules of Civil Procedure provides the standard for granting a stay of a preliminary injunction pending appeal. *O'Brien v. Appomattox County, Virginia, et al.*, 2002 WL 31663226, at *2 (W.D. Vir. Nov. 15, 2002). While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. Fed. R. Civ. P. 62(c). Here, Appellants have appealed the Bankruptcy Court's issuance of a preliminary injunction to this Court, and therefore Rule 62(c) governs.

II. THE LONG FACTORS

In *Long v. Robinson*, the Fourth Circuit articulated four factors to be used in considering whether a stay should issue: (1) the likelihood of prevailing on the merits of the appeal; (2) whether the moving party will suffer irreparable injury if the stay is denied; (3) whether the issuance of the stay would substantially injure the other parties to the appeal; and (4) consideration of the public interest. *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970); *see also In re Skinner*, 202 B.R. 867, 869 (W.D. Va. 1996). The Court applies the same standard for a stay pending appeal as for a preliminary injunction. *BDC Capital, Inc. v. Thoburn Ltd. Partnership*, 508 B.R. 633, 636 (E.D. Va. 2014). All four factors must be satisfied for a stay to be granted. *Id.*

A. THE APPEAL IS LIKELY TO SUCCEED BECAUSE THERE ARE NO FACTS ALLEGED OR PRESENTED IN SUPPORT OF THE LIQUIDATING TRUSTEE'S CLAIMS OR IN SUPPORT OF THE PRELIMINARY INJUNCTION

This Court reviews a bankruptcy court's findings of fact for clear error and legal questions *de novo*. *Id.* at 637; *see also Fuentes v. Stackhouse*, 182 B.R. 438, 440 (E.D. Va. 1995). In order to receive a stay pending appeal, the moving party must make a strong showing it would succeed on the merits on appeal. *BDC Capital, Inc.*, 508 B.R. at 637.

The Injunction Order should not have been entered because it is contrary to law, as it is unquestionably vague, and does not provide Appellants with sufficient notice as to what conduct it seeks to enjoin. Fed R. Civ. P. 65(d) requires that "every order granting an injunction . . . shall state the reasons why it issued; state its terms specifically; and describe in reasonable detail . . . the acts or acts sought to be restrained." Moreover, to obtain a preliminary injunction, the Liquidating Trustee bore the heavy burden of establishing (1) the likelihood of success on the merits, (2) likelihood of suffering irreparable harm in the absence of preliminary relief, (3) the balance of equities weighs in its favor, and (4) an injunction serves the public's interest. *WV Ass'n of Club Owners & Fraternal Servs v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

In considering whether Appellants are likely to succeed on appeal, it is necessary to evaluate the Liquidating Trustee's allegations in its Verified Complaint, the basis for which the Injunction Order was issued. (Exhibit G). Notably, the Bankruptcy Court did not make any findings of fact or law in its Injunction Order. Nor did it do so at the August 18, 2016, hearing on the Liquidating Trustee's motion. (Exhibit D). Indeed, the Verified Complaint is void of the necessary factual support for which the Bankruptcy Court could have lawfully entered its Injunction Order, and comport with the strict requirements of Rule 65(d).

Of the Verified Complaint's 145 paragraphs, just ***nine (9)*** concern Lemberg Law or the Consumers as a group. (Exhibit C ¶¶ 52-54, 65-69, 71). There is ***not one*** factual allegation against any particular named Consumer.

Among those nine paragraphs, three (¶¶ 65-67) are boilerplate summations that the Consumers were patients of Women's Health in Spokane, Washington, who submitted blood samples to HDL for analysis. Three more (¶¶ 68, 69 & 71) merely restate prior allegations by Lemberg Law or the Consumers from filings in the bankruptcy proceeding that the Debt Collectors violated the FDCPA by attempting to collect amounts which are not owed. Those six paragraphs *are the entirety* of Plaintiff's factual allegations concerning the 21 Consumer defendants.

The remaining three paragraphs (¶¶ 52-54) reference Lemberg Law. In paragraph 52, the Plaintiff alleges that "Lemberg Law . . . has threatened to sue the Collectors for their activities as debt collectors for the estates and has dispatched correspondence designed to hamper the Liquidating Trustee's legitimate efforts to collect property of the estate consistent with his duties under the Plan." (*Id.* ¶ 52). The paragraph is puffery, a threadbare conclusory allegation not entitled to the presumption of truth and which cannot form the factual predicate of a complaint. *Iqbal*, 556 U.S. at 663 ("threadbare recitals of a cause of action's elements, supported by mere conclusory statements" not entitled to presumption of truth). Plaintiff does not allege any actual threat, why Lemberg Law conduct or statements constituted a "threat," or when or to whom such "threat" was made. Nor does Plaintiff identify any correspondence "dispatched" by Lemberg Law or explain how or why such phantom correspondence was "designed to hamper" the Liquidating Trustee's efforts to collect.

In paragraph 54, Plaintiff alleged that it is "aware that various potentially unknown parties, who *may* be associated with Lemberg Law, have issued consumer complaints to the Attorney General of the State of Washington and the Attorney General of the State of Texas, and have further made written advances to the U.S. Tree enclosing copies of letters directed to Monterey . . . ." (Exhibit C ¶ 54 (emphasis supplied)). First, this is "speculation or suspicion" of conduct is woefully insufficient to support a cause of action – actual facts must be pled. *In re Vaccaro*, 2012 WL 2789011, at *2 (Bankr. E.D. Tenn. July 9, 2012) (citing *League of Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 562)). Whatever the Liquidating Trustee's summations or guesses about who "may" be associated with whom, such is not an allegation of conduct by Lemberg Law. Second, the Trustee's theory runs directly contrary to our Constitution which allows citizens to speak freely and to petition their government, and no doubt to various State statutes that permit consumer complaints and charge officials with investigating them. Not only is there no allegation against Lemberg Law here, the supposed act the Liquidated Trustee complains of is entirely lawful behavior by consumers complaining to their state authorities.

The only remaining allegation which identifies an action supposedly taken by Lemberg Law is contained in paragraph 53. There, Plaintiff alleges that Lemberg Law "used physicians practices, including Women's Health, as a means to amass more clients and to further interfere with collections of receivables that constitute property of HDL's estate." (Exhibit C ¶ 53). The characterization that Lemberg Law amassed more clients to "further interfere" with the Plaintiff's collections is no more than a conclusory allegation not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 663.[7] When Consumers received the Liquidating Trustee's letters, they

[7] It is also, frankly, nonsense. Lemberg Law was retained by clients who sought legal representation. There is nothing – not one thing – nefarious about such conduct.

sought legal representation. That's their right. *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983) (In many situations, the right to a hearing would be meaningless were the litigant forbidden to obtain the assistance of a lawyer in determining the nature of the claims against him, the opposing arguments available to him, and the manner in which his case would be most effectively presented); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117–18 (5th Cir. 1980), cert. denied, 449 U.S. 820, 101 S. Ct. 78 (1980). Their right to sue and be sued, and to bring legal proceedings, are among the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States. *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 28 S. Ct. 34 (1907).

From the foregoing unspecified, nonexistent, or, in the case of the Women's Health webpage, justified and innocuous conduct, the Liquidating Trustee asserts its seven causes of action against Appellants.

- **Count I fails to state a claim for relief for contempt under bankruptcy code sections 105(A) and 362(A).**

Though no reference is made thereto, presumably the Liquidating Trustee is referencing 11 U.S.C. § 362(a)(3), in which case it fails to demonstrate any act Lemberg Law or Consumers took to "obtain" or "control" property of the estate; indeed none was taken. Similarly, to the extent that the Liquidating Trustee believes Appellants violated 11 U.S.C § 362(a)(1), it is inapplicable, and does not prohibit collection of post-petition debts. *In re Reynard*, 250 B.R. 241, 244 (Bankr. E.D. Va. 2000) ("[T]he automatic stay does not 'prevent the commencement of a lawsuit to collect a post-petition debt.'").

- **Count II fails to state a claim for tortious interference with contract.**

To establish tortious interference of contract in the state of Washington, the following five elements must be met: (1) a valid contract; (2) that the defendant had knowledge of the contract; (3) that the defendant intentionally interfered with the contract and caused a breach or termination; (4) that the defendant interfered for an improper purpose; and (5) resultant damages. *BOFI Fed. Bank v. Advance Funding* LLC, 105 F. Supp. 3d 1215, 1219 (W.D. Wash. 2015). Though vague, it appears the Liquidating Trustee is claiming that Consumers have interfered with "Patient Obligations." (Exhibit C ¶ 97). If so, the Liquidating Trustee fails to allege the existence of a valid contract, and provides no terms of the "contracts," the value exchanged, or the services performed. Tellingly, how the "contract" was interfered with is not stated, and *the parties to the alleged contracts are not even stated*. Additionally, to the extent that the Liquidating Trustee complaints of cease-communication and dispute letters sent to Debt Collectors, such letters are explicitly authorized and mandated by federal law. 15 U.S.C §§ 1692c(c) and g(b).

- **Count III fails to state a claim for declaratory relief under bankruptcy code sections 105(A) and 362(A) and 28 U.S.C. § 2201**

The Liquidating Trustee is requesting the Bankruptcy Court to declare the rights of all former patients of HDL, many of which are unidentified, absent non-parties, to this action. Such course of action is unavailable here. *Versol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582, 587 (E.D. Va. 1992) ("nonparties are not bound by declaratory judgments" (citing *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 16 n. 1 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028, 103 S. Ct. 1279 (1983))). Moreover, the Liquidating Trustee fails to plead an *actual* controversy; the relief sought is merely a wish-list of demands. To be sure, the only controversy referenced is that "the Alleged Releases did not operate to waive Plaintiff's right to collect upon the Excluded Receivables"; a claim inapplicable to Appellants. (Exhibit C ¶ 109). Factually, there are no allegations in the Verified Complaint that Consumers were paid monies by an insurance company for any service, and, therefore, that they are attempting to avoid payment due to the "Alleged Release." Therefore, no controversy applicable to Appellants exists.

- **Count IV fails to state a claim for avoidance of constructively fraudulent transfer pursuant to bankruptcy code sections 548 and 550.**

Constructive fraudulent transfer pursuant to 11 U.S.C. § 548(a)(1)(B) requires a transfer of an interest of the debtor in property or obligation where the debtor received less than a reasonably equivalent value and was insolvent at the time of transfer. The Verified Complaint mirrors the elements of the claim, without alleging any facts to support such allegations in violation of the *Iqbal* standard. *See In re Hydrogen, L.L.C.*, 431 B.R. 337, 352 (Bankr. S.D.N.Y. 2010) (claim for constructive fraudulent transfer must "provide adequate facts to support each" element of the claim). To survive a motion to dismiss, the claim must plead the specific "dates, amounts, and names of transferees" and identify the "consideration received by each transferor, [and] information as to why the value of such consideration was less than the amount transferred." *In re Caremerica, Inc.*, 409 B.R. 737, 755-56 (Bankr. E.D.N.C. 2009) ("§ 548(a)(1)(B) claims must satisfy Rule 8(a) and contain a short and plain statement showing entitlement to relief. Under *Iqbal,* it follows that claims to avoid constructively fraudulent transfers must assert factual allegations which show that relief is plausible.") (dismissing constructive fraud claim). Plaintiff alleged no facts in support of these claims. Without any information regarding the alleged transfer, aside from conclusory statements that one occurred, it is impossible to determine whether Consumers received reasonable equivalent value for said transfer. Moreover, there is no statement of what value was transferred to Consumers, when it was transferred, or to whom it was transferred. Accordingly, Count IV is legally insufficient.

- **Counts V and VI fail to state a claim for avoidance of constructive fraudulent transfer.**

Similar to Count IV, Counts V and VI of the Verified Complaint are deficient of factual support. The laws of Virginia, Washington, Pennsylvania, and Oklahoma all require a showing that there was (1) a transfer; and (2) that the plaintiff failed to receive reasonably equivalent value in exchange for that transfer. As stated as to Count IV *supra*, the Liquidating Trustee failed to plead any facts showing a transfer, consideration it received in return for that transfer, and other required identifiable information. Likewise, Counts V and VI are mere "formulaic recitation[s] of the elements" of the claim with a "complete absence of facts" in support and must be dismissed. *In re Hydrogen, L.L.C.*, 431 B.R. at 353 (quoting *Iqbal*, 129 S. Ct. at 1949).

- **Count VII fails to state a claim for injunctive relief under Bankruptcy Sections 105(A) and 362(K) and Bankruptcy Rules 7001(7) and 7065)**

The injunctive relief claim is derivative of Counts I through VI. As discussed in detail, Counts I through VI lack factual support, do not establish plausible claims for relief, and are not grounds for injunctive relief.

The foregoing claims are not supported by facts. Rather, the Liquidating Trustee relied on conclusory allegations of wrongdoing which only mirrored the claims for relief. The Bankruptcy Court made no findings regarding the likelihood of success on the merits. Had it done so, it would have not been able to point to any act of Lemberg Law or the Consumers (none were actually alleged) which would support the broad claims for relief sought. Thus, there were no grounds to enjoin Lemberg Law or the Consumers and they are likely to succeed on the merits of their appeal.

B. APPELLANTS WILL SUFFER IRREPARABLE HARM IF THE STAY IS DENIED BECAUSE THE VAGUE INJUNCTION ORDER EXPOSES THEM TO THE RISK OF CIVIL CONTEMPT WITHOUT BEING PLACED ON NOTICE OF WHAT CONTACT THEY ARE ENJOINED FROM TAKING

The dangers of issuing a vague order and ignoring the strict requirements of Rule 65(d) cannot be ignored. As the Supreme Court noted in *Int'l Longshoremen's Assn*., Rule 65(d) reflects Congress' concern with the dangers inherent in the threat of a contempt citation for violation of an order so vague that an enjoined party may unwillingly and unintentionally transcend its bounds. *Int'l Longshoremen's Assn. Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 73, 88 S. Ct. 201 (1967); *see also H.K. Porter Co. v. Nat'l Friction Prod. Corp*., 568 F.2d 24, 27 (7th Cir. 1977) ("Because of the risks of contempt proceedings, civil or criminal, paramount interests of liberty and due process make it indispensible for the chancellor or his surrogate to speak clearly, explicitly, and specifically if violation of his direction is to subject a litigation to coercive or penal measures, as well as to payment of damages").

Appellants will suffer irreparable injury if their motion to stay is denied, as the Injunction Order lacks the requisite specificity to place Appellants on notice as to what actions they are enjoined from taking. (Exhibit G). In its Injunction Order, the Bankruptcy Court issued the following orders relevant for discussion:

> "ORDERED THAT the Defendants[8] shall be preliminarily enjoined from taking any action adverse to the Liquidating Trustee, the Collectors, or any other professionals or agents acting at the direction of the Liquidating Trustee to collect or administer the Excluded Receivables for the benefit of the estate; and it is further
>
> ORDERED THAT the Defendants shall be preliminarily enjoined from contacting physicians, groups of physicians, related entities, patients, or any other persons or entities concerning the Excluded Receivables; and it is further
>
> ORDERED THAT the status quo ante shall be maintained pending this Court's final determination on the merits of the Complaint."

[8] Herein referred to as "Lemberg Law" and "Consumers."

(*Id.*). Conspicuously, the Bankruptcy Court's Order does not describe what actions are "adverse" to the Liquidating Trustee, or other persons acting on its behalf. Even disputing an account, or refusing to pay it, or advising someone to do either, could be a violation of the injunction. Likewise, the Bankruptcy Court does not set forth the reasons for issuing the injunction, as required by Rule 65(d). As apparent on its face, the Injunction Order lacks the specificity requirements mandated by Rule 65(d), as discussed by the Fourth Circuit in *Thomas*.

The lack of clarity in the Injunction Order places Appellants in a position of irreparable harm. For example, if Consumer Eileen Arendt were to contact her insurance company regarding a disputed debt, and the Liquidating Trustee were to report such to the Court, would she be in violation of the Injunction Order? Such conduct seems innocuous, yet it is clearly within the scope of the Bankruptcy Court's Order enjoining contact with "any other persons or entities concerning the Excluded Receivables." (*Id.*). If so, she could be found liable for civil contempt, a negative distinction to follow her for life.

As stated, the unknowing is the danger. Appellants deserve to be placed on notice as to what contact they are enjoined from taking; Rule 65(d) mandates that. Presently, Appellants are in the unfavorable position where it is unknown what conduct the Injunction Order prescribes. Therefore, Appellants will suffer irreparable injury absent the issuance of a stay.

C. THE BALANCE OF EQUITIES TIPS IN APPELLANTS' FAVOR AS THEY ARE AT RISK OF BEING FOUND IN CIVIL CONTEMPT FOR VIOLATING A VAGUE ORDER WHILE THE LIQUIDATING TRUSTEE BEARS NO RISK

In determining whether the balance of equities tips in favor of the movant, the Court must balance the likelihood of irreparable harm to Appellants against the likelihood of substantial harm to the non-movants, i.e., the Liquidating Trustee. *BDC Capital, Inc.*, 508 B.R. at 640; *see also Safeway Inc. v. CESC Plaza Ltd. Partnership*, 261 F. Supp. 2d 439, 472 (E.D. Va. 2003) ("Generally, this inequity consists, at least in part, of a balance of the hardships imposed on the defendant if the injunction is granted versus the hardships imposed on the plaintiff if the injunction is denied"); *Akers v. Mathieson Alkali Works*, 144 S.E. 492 (Va. 1928) ("the court should weigh the injury that may accrue to the one or the other party, and also the public, by granting or refusing the injunction"). Prior to balancing the equities, the court must first define the harm to the non-moving party of allowing a stay pending appeal. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365 (2008).

As discussed in detail above, Appellants are at great risk of suffering irreparable harm should a stay not issue. Without notice of what actions Appellants are enjoined from taking, they jointly face the risk of violating the Injunction Order for taking ***any action*** remotely related to the Excluded Receivables. The Court must identify a harm posed to the Liquidating Trustee (the non-moving party) if a stay is granted. *Id.* No harm exists here. Because Appellants are the only parties facing the risk of any cognizable harm, the balances of equities for issuing a stay weighs in their favor.

D. PUBLIC POLICY FAVORS ISSUANCE OF A STAY TO PREVENT NON-COMPLIANCE WITH THE FEDERAL RULES RESULTING IN INADVERTENT VIOLATIONS OF ENJOINED CONDUCT

Finally, public policy favors the issuance of a stay. Here, the Injunction Order lacks the specificity to place Appellants on notice of what actions would violate the Bankruptcy Court's order. As a practical matter, public policy favors compliance with the Federal Rules of Civil Procedure, especially with respect to notice. Stated alternatively, non-compliance with the Federal Rules creates a bad precedent, where a party to a lawsuit could be found in violation of a court order, without ever receiving notice as to what conduct is prohibited. As such, strict adherence is necessary. Otherwise, the Federal Rules of Civil Procedure are just words without meaning, carrying no effect.

CONCLUSION

For the reasons contained herein, the Court should grant this Motion, and issue a stay in this matter.

Dated: October 25, 2016

Respectfully Submitted,
LEMBERG LAW, LLC AND THE CONSUMERS
(AS DEFINED *SUPRA*)

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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